LEC Contractors (M) Sdn Bhd v Castle Inn Sdn Bhd (No 2)

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 22-2040 OF 1998
ABDUL KADIR MUSA J
15 JANUARY 2001

Civil Procedure *— Declaration — Application for — Action against defendant to set aside sum as rentention sum — Whether proper in law*

Contract *— Damages — Liquidated damages — Whether defendant entitled to deduct for liquidated damages without having to set aside for retention sum — Whether application for injunction ordering the defendant to set aside retention sum should be allowed*

Contract *— Specific performance — Precluded once agreement is rescinded — Action against defendant to set aside sum as rentention sum — Specific Relief Act 1950 s 41*

The plaintiff was the main contractor and the defendant was the employer for the project of a proposed hotel cum office development. As a result of the undisputed termination or rescission of the agreement contract executed between the parties for the project, the plaintiff filed an application for a declaration that the defendant is obliged forthwith to pay the sum of RM4.8m being the said retention sum ('RS') under the conditions of contract into a separate bank account whereby the defendant thereafter to stand possessed of such sums as trustees thereof to apply the same only in accordance with the trusts specified in cl 30(4)(a) of the conditions of contract and an injunction ordering the defendant to forthwith do so.

Held, dismissing the application with costs:

(1) It is trite law that once liquidated and ascertained damage ('LAD') exceeds the retention sum ('RS'), the obligation of the defendant, as employer of the project, to set aside the RS into separate bank account ceases automatically. The defendant was therefore entitled to deduct for LAD without having to set aside for RS as stipulated by cl 30(4)(a) of the conditions of the contract. On this ground alone, the injunction applied for is refused (see pp 515H, 517G–H); Henry Boot Building v Croydon Hotel & Leisure Co 36 BLR 41 followed.

(2) The plaintiff had their contractual right to insist the defendant to set aside for RS before the contract was rescinded notwithstanding the fact that the defendant may have a justifiable right to set off for LAD. But the failure on the part of the plaintiff to discharge their contractual obligation in not requesting and or compelling the defendant to set aside for the required RS during the life of the contract statutorily deprived them to seek relief under s 41 of the Specific Relief Act 1950 (see p 523C–D, H–I).

(3) Upon recission of the contract by the plaintiff, the contractual right of the plaintiff to insist the defendant to set aside the required RS is not the plaintiff's 'right previous vested that remained untouched'. That plaintiff's right can only be insisted during the life span of the contract and not after it was rescinded by the plaintiff. As such by virtue of s 56 of the Contracts Act 1950, the defendant cannot be mandatorily ordered to fulfil his 'obligation' of setting aside the required RS after 11 July 1998, the material date in which the contract was rescinded by the plaintiff (see p 525C–E).

[**Bahasa Malaysia summary**

Plaintif adalah kontraktor utama dan defendan adalah majikan untuk cadangan projek kemajuan hotel dan pejabat. Sebagai akibat penamatan dan pembatalan perjanjian kontrak yang dilaksanakan antara pihak-pihak yang tidak dipertikaikan untuk projek tersebut, plaintif telah memfailkan suatu permohonan deklarasi bahawa defendan diwajibkan untuk membayar jumlah RM4.8j yang merupakan wang tahanan ('WT') di bawah syarat-syarat kontrak ke dalam akaun bank yang berasingan di mana defendan kemudian yang memiliki jumlah-jumlah tersebut sebagai pemegang-pemegang amanah memohon yang sama menurut amanah yang dinyatakan di dalam fasal 30(4)(a) syarat-syarat kontrak dan suatu injunksi mengarahkan defendan untuk berbuat demikian.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Ia adalah undang-undang yang telah diterima bahawa selepas ganti rugi jumlah tertentu ('GRJ') melebihi wang tahanan ('WT'), kewajipan defendan, sebagai majikan projek tersebut, untuk menguntukkan WT ke akaun yang berasingan luput secara automatik. Maka defendan berhak untuk menolak GRJ tanpa keperluan untuk menguntukkan WT seperti yang dinyatakan fasal 30(4)(a) syarat-syarat kontrak. Di atas alasan ini sahaja, injunksi yang dipohon adalah ditolak (lihat ms 515H, 517G–H); *Henry Boot Building v Croydon Hotel & Leisure Co* 36 BLR 41 diikut.

(2) Plaintif mempunyai hak kontraktual untuk memerlukan defendan untuk menguntukkan bagi WT sebelum kontrak dibatalkan walau sekalipun fakta bahawa defendan mempunyai hak yang boleh dijustifikasikan menolaknya bagi GRJ. Tetapi kegegalan di pihak plaintif untuk melepaskan kewajipan kontraktual mereka di dalam tidak meminta atau memaksa defendan untuk menguntukkan JT yang diperlukan semasa kontrak masih hidup secara statutori telah menyebabkan kehilangan relif di bawah s 41 Akta Relif Spesifik 1950 (lihat ms 523C–D, H–I).

(3) Selepas pembatalan kontrak oleh plaintif, hak kontraktual plaintif untuk menegaskan kepada defendan untuk menguntukkan WT

yang diperlukan bukanlah hak plaintif yang terdahulu yang masih tidak disentuh. Hak plaintif tersebut hanya boleh ditegaskan semasa kontrak masih hidup dan bukan selepas ia dibatalkan oleh plaintif. Dengan itu menurut s 56 Akta Kontrak 1950, defendan tidak boleh diarahkan secara mandatori untuk menunaikan 'kewajipannya' untuk menguntukkan WT yang diperlukan selepas 11 Julai 1998, tarikh yang material di mana kontrak dibatalkan oleh plaintif (lihat ms 525C–E).]

Notes

For cases on damages generally, see 3(2) Mallal's Digest (4th Ed, 2000 Reissue) paras 2436–2581.
For cases on specific performance generally, see 3(2) Mallal's Digest (4th Ed, 2000 Reissue) paras 3810–3862.
For cases on declaration generally, see 2(1) Mallal's Digest (4th Ed, 1998 Reissue) paras 1497–1536.

Cases referred to

Caxton (Kelang) Sdn Bhd v Susan Joan Labroov & Anor [1988] 2 MLJ 604 (refd)
Concorde Construction Co Ltd v Colaan Co Ltd (1984) 29 BLR 125 (refd)
Henry Boot Building v Croydon Hotel & Leisure Co 36 BLR 41 (folld)
Hsin Chong Contruction Co v Yaton Realty Co 40 BLR 119, (refd)
Jagathesan v Linggi Plantations Ltd [1969] 2 MLJ 253 (refd)
Johnson v Agnew [1980] AC 367 (refd)
Karuppiah v Petaling Garden Co Sdn Bhd [1972] 1 MLJ 173 (refd)
Mac Jordan Construction Ltd v Brookmount Erostin Ltd (in administrative receivership) 56 BLR 1 (refd)
Marshall's Will Trusts, Re [1945] 1 All ER 550 (refd)
Morello Sdn Bhd v Jagues (International) Sdn Bhd [1995] 1 MLJ 577 (refd)
Mussen v Van Diemen's Land Co [1938] 1 All ER 210 (refd)
Rayack Contruction Ltd v Lampeter Meat Co Ltd (1979) 12 BLR 30 (refd)
Yong Mok Hin v United Malay States Sugar Industries [1967] 2 MLJ 9 (refd)

Legislation referred to

Contracts Act 1950 ss 40, 56, 65, 76
Specific Relief Act 1950 s 41

Vincent Lim (*Vincent Lim & Keoh*) for the plaintiff.
Dato' Siva (*V Siva & Partners*) for the defendant.

Abdul Kadir Musa J. : LEC Contractors (M) Sdn Bhd, the plaintiff, filed in the encl (3) application on the 29 October 1998 for prayers (a)–(e) of the

said encl (3). The said encl (3) is supported by Joe Hyon Jae, encl (2), dated 28 October 1998. By that application, the plaintiff is seeking the following reliefs:

(a) a declaration that the defendant is obliged forthwith to pay the sum of RM4.8m being the said retention sum under the conditions of contract ('the conditions') into a separate bank account hereinafter referred to, the defendant thereafter to stand possessed of such sums in such account as trustees thereof to apply the same only in accordance with the trusts specified in cl 30(4)(a) of the contract;

(b) an injunction ordering that the defendant forthwith pay the sum of RM4.8m being the said retention sum under the conditions into a separate bank account whereby the defendant hereafter to stand possessed of such sums in such account as trustees thereof to apply the same only in accordance with the trusts specified in cl 30(4)(a) of the contract executed by the plaintiff and defendant on 9 January 1996;

(c) An order that the defendant, for the purposes of payments and the trust referred to in paras (a) and (b) hereof do:

(i) forthwith upon making of this order cause to be opened a separate bank account to be designated LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Constructions Sdn Bhd) Trust Account;

(ii) forthwith upon the opening of such account, inform the plaintiff by letter signed by a proper officer of the defendant, disclosing full particulars of the said bank account including the name in which the same is maintained and the number thereof, and the name, branch and address of the bank maintaining the same; and

(iii) forthwith upon receipt of all bank statements and other communications of whatsoever nature touching upon or concerning the said bank account, furnish true copies of the same to the solicitors of the plaintiff.

(d) an injunction restraining the defendant, by its directors, officers, servants or agents or any of them otherwise howsoever from applying the trust monies as and when paid into a separate bank account, otherwise than in accordance with the said trusts; and

(e) that the costs of this application be to the plaintiff in any event;

From the above, it is without doubt that the plaintiff's prayer for an order of a declaration as per paragraph (a) aforesaid ('the said order') is the main and substantive prayer of encl (3) application. All the other reliefs sought will have to depend on whether or not the plaintiff is successful in obtaining the said order.

Enclosure (3) application ('the application') was filed by the plaintiff on 29 October 1998 flowing from the undisputed termination or rescission of the agreement contract duly executed between the plaintiff and the defendant, Castle Inn Sdn Bhd, on 15 July 1995 ('the contract'). By the contract, the plaintiff was the main contractor and the defendant was the employer for the project known as:

> The execution and completion of a proposed hotel cum office development at Jalan Harimau, Johor Bahru, for Castle Inn Sdn Bhd.

for the sum of RM96m. The terms and conditions of the contract are as stipulated by exh 'JHJ-1' to encl (2).

From the plaintiffs submission, it became very apparent to me that the main concern of the plaintiff in filing the application was, according to Mr Vincent Lim, learned counsel for the plaintiff, '... to preserve the status quo of the matter ... .' pending a final outcome in arbitration pursuant to cl 34 of the contract. The said cl 34, inter alia, provides:

> 34 In the event of any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to any matter ... whatsoever nature arising thereunder or in connection therewith ..., shall be referred to arbitration.

'[T]he matter ... .' referred to by Mr Vincent must surely be 'the RM4.8m retention sum' ('the RS') which represents 5% of the RM96m for the whole aforesaid project under the contract.

From the above, it was strongly and elaboratedly argued by Mr Vincent that based on the facts of the application and a number of decided cases referred to and relied on by him, it would be the defendant's primary legal duty to set aside the RS and place it in a separate bank account on trust for the plaintiff by virtue of cl 30(4) of the contract, even after the contract was howsoever terminated. Thus, as trustee for the plaintiff, it was his submission that the defendant was under legal obligation not only to open such an account but was also contractually bound to maintain the same for the benefit of the plaintiff. If that was not yet done, it would therefore be the defendant's legal duty to do so. Since there was a denial by the defendant that the RS had never been set aside in line with the intention of the aforesaid cl 30(4) of the contract even till 19 October 1998 when the application was filed, it was therefore submitted by Mr Vincent that the court should be sufficiently persuaded to grant order in terms of the application; hence '... [preserving] the status quo of the matter ...' pending the final outcome in arbitration as stated earlier'.

Dato' Siva, learned counsel for the defendant, agreed that the aforesaid cl 30(4) of the contract imposes a contractual obligation to create such RS in certain factual circumstances. On that basis, he therefore vehemently argued that on the facts of the case before me, his client was not bound to do so for a number of reasons; the main and substantive one was the recission of the Contract by the plaintiff vide their letter dated 11 July 1998 marked as 'THB-1' to encl (5A) in exercise of their rights pursuant to cl 26(1)(6) of the contract. He submitted that such an act by the plaintiff has the effect of making the contract void ab initio which will consequentially relieve the defendant of all their obligations under the contract as from 11 July 1998; there was no valid contract as on that day. That being so, it was thus his contention that the plaintiff's application should be dismissed as there was nothing to declare.

He further submitted that due to the plaintiff's aforesaid rescission, even if the contract was held not to be void ab initio by me, the defendant

would still be in the same position as above as from the 11 July 1998 since there was no valid contract as from that date. Thus, the more legitimate claim against his client, if any, would and should be an appropriate claim for damages, but certainly not for an application for an order of declaration as prayed for in this application.

The plaintiff's application for an order of declaration was also strongly opposed by Dato' Siva on the grounds of estoppel and waiver. It was his contention that for the plaintiff to be justifiably reasonable to seek an equitable relief for an order of declaration, they should not have waited for almost three years without doing anything to enforce the defendant to observe their obligations under the contract before they filed in their encl (3) application.

In the above context, it cannot be disputed that the contract was duly executed between the plaintiff and the defendant on 15 July 1995. During the subsistence of the contract, there were numerous architect certificates issued until it was rescinded and/or terminated by the plaintiff on 11 July 1998. During that period, there were thirty certificate of payments being issued; the first was dated 24 November 1995, and the last was dated 11 June 1998. It is also an undisputed fact that between 24 November 1995 and 11 June 1998, no RS has ever been kept in a separate bank account for the benefit of the plaintiff. That fact was well within the plaintiff's knowledge and yet, they did nothing to cause the defendant to fulfil their obligations under cl 30(4) of the contract. That passive act of the plaintiff, according to Dato' Siva can be construed as '... the plaintiff's [by its] own conduct [,] ... has waived their rights under cl 30(4)(a) [of the contract].'

Lastly, Dato' Siva also submitted that his client had the right to deduct liquidated and ascertained damages ('LAD'), and also the costs of rectification of defective works by virtue of cll 22 and 15 of the contract respectively. The said cl 22 gives the defendant, as 'employer' of the project, the right to '... deduct such sum from any monies due or to become due to the contractor, [the plaintiff], under [the] contract.' As damages for any non-completion of any work under the contract. '... [A]ny monies due or to become due to the contractor ...' referred to by the said cl 22, would therefore, in my considered opinion, include the RS which is the main subject matter of the plaintiffs encl (3) application. In that respect, it was contended by the defendant that it was entitled to a RM50,000 per day LAD. By the plaintiff's own calculations up to the 11 July 1998, the date of the rescission of the contract, the total sum of LAD amounted to RM15,050,000.

Based on the aforesaid figure of RM15,050,000, it was therefore emphasized by Dato' Siva that it is trite law that once LAD exceeds the RS, the obligation of the defendant, as employer of the project to set aside the retention sum into a separate bank account as contended by the plaintiff's counsel ceases automatically. For that he relied on the case of *Hsin Chong Contruction Co v Yaton Realty Co* 40 BLR 119, which cited and relied on the case of *Henry Boot Building v Croydon Hotel & Leisure Co* 36 BLR 41.

In the said *Henry Boot*'s case, the Court of Appeal, in dismissing the appeal by the plaintiff against Mr Justice Thomas' decision in refusing to grant a mandatory injunction applied for, held as follows:

> (1) Although under cl 30 (4)(a) the employer was under an obligation to appropriate and set aside amounts retained as a separate trust fund and that obligation could be enforced by the grant of a mandatory injunction, no such injunction could be granted at the time when the employer was entitled to deduct a greater amount of liquidated or ascertained damages because there was no subsisting obligation to appropriate and set aside ...

The reason for it is contained pp 46–47 of the same case when Nourse LJ said as follows:

> … At the most their relationship is, as [Mr Justice Thomas] has held, that of debtor and creditor. It necessarily follows that no injunction can be granted, … .

Thus, if their relationship was purely 'that of debtor and creditor' and not as 'a trustee', the question of the defendant setting aside for purposes of appropriating the said sum as RS in a separate bank account for the benefit of the plaintiff will never arise by virtue of cl 22 of the contract.

As in the aforesaid *Henry Boot*'s case, cl 22 of the contract in the present case before me has similar and identical effect as that in cl 22 of the said *Henry Boot*'s case. Both the said cl 22 undisputably gave the defendant the necessary right to have recourse to the RS from time to time for payment of any legitimate and contractually binding LAD. Such payment(s) could be made by the defendant by deducting from any sum due or to become due to the plaintiff.

According to the 'Commentory' at p 42, of *Henry Boot*'s case, it was noted as follows:

> ... [The right in the present case referred to above] in effect takes precedence over the obligation to create and set aside a separate trust fund into which the retention money would otherwise be paid. If therefore a certificate is issued under cl 22 before a separate trust fund has been created, the employer would not be obliged to establish such a trust fund when to do so would be pointless since he would be entitled to have immediate recourse to it to recover the amounts to which he was entitled. Similarly, even where a trust fund has been created, the issue of a certificate under cl 22 … immediately confers on the employer a right to draw from that fund so that he is from that time pro tonto no longer a trustee but a creditor. (Emphasis added.)

Insofar as this application is concerned, there was no dispute that certificates under cl 22 of the contract were issued. It is also an undisputed fact that when those certificates were issued the RS referred to by the parties had not yet been set aside. Thus, on the authority of the said *Henry Boot*'s case, I conclude that the defendant was therefore entitled to deduct such amount for LAD without having to set aside for RS. The fact that there were LAD payments to be made could not, in my considered opinion, be disputed by the plaintiff, especially in the light of 'THB-2' to encl 5(A).

A The aforesaid 'THB-2' of encl 5(A) dated 5 March 1998 from Unibina Architect, the defendant's architect, states as follows:

> CERTIFICATE ON NON-COMPLETION
> It is hereby certified that you have failed to complete the works by the date for completion stated in the appendix to the conditions of contract … ie on 12 September 1997 and in my opinion the said works ought to have been completed.
>
> In accordance with cl 22 of … [the] contract, you are hereby informed that you are liable to pay or allow to the employer a sum calculated at the rate stated in the appendix to … [the] contract ie RM50,000 per day as [LAD] for the period during which the said works shall so remain and have remained — incomplete and the employer may deduct such damages from any monies due or to become due to you under this contract. (Emphasis added.)

It is to be noted that the amount of 'RM50,000 per day for LAD' is not the invention of the defendant nor the Unibina Architect, but was spelt out in the appendix to the said contract.

Secondly, such a claim for LAD was brought about as a result of the plaintiff's letter dated 11 July 1998, marked as exh 'THB-1' to encl 5(A) to the defendant rescinding the contract with immediate effect. At p 3 of the said letter, the plaintiff wrote to the defendant, inter alia, as follows:

> ... it can be clearly established that you have unequivocally envinced your intention not to be bound by the terms and conditions of the contract and have repudiated the contract. We are to inform you that we hereby accept your said repudiation, and hereby rescind the said contract with immediate effect … .
>
> Further and/or in the alternative, … we refer you to cl 26(1)(b) of the contract … and we accordingly hereby give you notice that our employment under this contract is determined forthwith. (Emphasis added.)

Nowhere in the plaintiff's affidavits did they denied that there were no defective works which ended up in LAD payment(s) to be made. However, they did state that various figures given by the defendant to the plaintiff were unrealistic, excessive and inflated without producing or proposing figures which would and could have persuaded the court to accept such figures so produced by the plaintiff. In such absence, Dato' Siva urged the court to accept the figures produced by the defendant as being reasonable, and that figure is well above the RM4.8m RS spoken of by cl 30(4)(a) of the contract. In that context, I fully agree with Dato' Siva's contention. The fact that the certificates under cl 22 of the contract have been issued before the RS was ever set aside, and premised on the authority of the aforesaid *Henry Boot*'s case will exonerate the defendant of the contractual obligation to appropriate and set aside the required RS as stipulated by cl 30(4)(a) of the contract. On that ground itself, the injunction applied for should therefore be refused.

In the aforesaid *Henry Boot*'s case, the Court of Appeal approved the case of *Rayack Contruction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30, which was heavily relied on by the plaintiff to urge the court to issue an order of declaration in favour of their application. I must point out at this very juncture that it was not disputed by Dato' Siva that principles laid

down in the said *Rayack*'s case are correct but it was argued by him that the said case has no application to the plaintiff's case. For that reason, this requires me to look further whether or not the said *Rayack*'s case can assist the plaintiff's case.

In the said *Rayack*'s case, Vinelott J, granted the plaintiff the declaration sought for and ordered that the defendant are to pay the required RS into a separate account. This case was followed by Mr Justice Rhind in *Concorde Construction Co Ltd v Colaan Co Ltd* (1984) 29 BLR 125.

However, closer perusal of the facts of both the said *Rayack*'s case and the *Concorde*'s case shows a very clear and apparent distinction with the present application before me. In both the aforesaid cases, there was no termination of the relevant contract. I would have held the same if the contract in this application was, at the time of filing encl (3) application on 29 October 1998, that contract was still subsisting. Unfortunately for the plaintiff, it is an undisputed fact that by their letter dated 11 July 1998, the contract was rescinded with immediate effect. It was so admitted by the plaintiff as being their contractual right to do so pursuant to and by virtue of cl 26(1)(b) of the contract.

The aforesaid rescission must have led Dato' Siva to submit that, such an act by the plaintiff has the effect of making the Contract void ab initio. In support, he quoted in full s 40 of the Contracts Act 1950 ('the Act') and also the cases of: (i) *Yong Mok Hin v United Malay States Sugar Industries* [1967] 2 MLJ 9; and (ii) *Mussen v Van Diemen's Land Co* [1938] 1 All ER 210. That conclusion was strongly opposed by Mr Vincent who contended that such an action of the plaintiff will not make the contract void ab initio. He further argued that the rights of the plaintiff under 'such a rescinded contract', including their right to insist to due compliance by the defendant under cl 30(4)(a) of the contract by way of a declaration and a mandatory injunction, remains to be valid and enforceable in the circumstances of the facts of their application.

On the facts of the present application, I completely disagree with Dato' Siva's above contention. Such an act by the plaintiff will only rendered the contract voidable and not void ab initio. As such, in the context of the parties' rights and obligation under the contract before the said rescission, will remain to be enforceable unless they aremade or become unjusticiable by law; for example such a claim is made: (i) outside the required statutory limitation period; or (ii) is estopped in equity from doing so; or (iiii) some special circumstances that made performance of any or all justifiable contractual obligation(s) impossible to perform, but not necessarily in the manner as canvassed by Mr Vincent, for a number of reasons.

Section 40 of the Contracts Act 1950 ('the Act'), in my considered opinion, certainly does not has that effect, as contended by Dato' Siva. It states as follows:

> *40 Effect of refusal of to perform promise wholly*
>
> *When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirely, the promisee may put an end to the contract,*

> *unless he has signified, by words or conduct, his acquiescence in its continuance. (Emphasis added.)*

'... [To] put an end to the contract ...' obviously does not make that contract itself void ab initio. It gives the innocent party an option 'to put an end to the contract' without being liable to perform his 'remaining obligation(s) under the contract. He is, as from that point of time, discharged from carrying out those 'remaining obligation(s)'; as far as he is concerned the contract is voidable. His rights and liabilities under the said contract before it became 'voidable' remain to be enforceable, '... unless he has signified, by words or conduct, his acquiescence in its continuance'.

P Ramanatha Aiyar in his *The Law Lexicon* (Reprinted 1987 Ed), at p 1117, wrote as follows:

> Rescind. To rescind is to abrogate, annul, avoid or cancel a contract.

but does not say that the particular contract is void ab initio by an act of rescission. KJ Avar's *Judicial Dictionary* (12th Ed, 1998), at p 1078 states that:

> Rescission of contract — Annulment or revocation of contract.

which is not the same as making the contract 'void ab initio'. The only point relied by Dato' Siva which appears to be in his favour is found in *Black's Law Dictionary* (6th Ed, 1990) at p 1306 under *Rescission of Contract*, which defines it as follows:

> To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party. To declare a contract void in its inception and to put an end to it as though it never were. ... A 'rescission' amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination, and it may be effected by mutual agreement of the parties, or by one of the parties declaring rescission of contract without consent of the other, if a legally sufficient ground therefor exists, or by applying to courts for a decree of rescission. ... It necessarily involves a repudiation of the contract ... . Nonetheless, not every default in a contract will give rise to a right of rescission. (Emphasis added.)

Applying the facts of this application to the above definition, I could not find any evidence that the contract was rescinded 'by mutual agreement of the parties, 'nor was there any application for an issuance of a decree of rescission from any court.' The 'declaring [of] rescission' of the contract was unilaterally done by the plaintiff without giving any notice of 'repudiation of the contract' due to the existence of 'a legally sufficient ground' to repudiate the contract due to the defendant's 'default in a contract.' HC Black certainly wrote that, '... not every default in a contract will give rise to a right of rescission.' Thus, it appears to me that whether or not there is that 'legally sufficient ground' to declare rescission to the contract as intended by the said author, it has to be first tested by the court; and there is no evidence to that effect.

Having said that the case on point is *Morello Sdn Bhd v Jagues (International) Sdn Bhd* [1995] 1 MLJ 577. It is clear at p 595, the Federal

Court recognized and endorsed what was said by the House of Lords in *Johnson v Agnew* [1980] AC 367 which is as follows: A

> … It is clear now that on rescission only future obligations come to an end… .

At p 596 para (B) of *Morello*'s case, it was stated by the court as follows:

> In such a situation, the rights and obligations of the parties so far as the future is concerned are discharged but those previously vested or incurred, as the case may be, remain untouched. (Emphasis added.) B

The 'previous vested [rights]' of the plaintiff in the context above is clearly, inter alia, 'the right to have recourse to the RS' if the RS was set aside. If that was not done, then it would be the plaintiff's 'obligation' to C insist that the required RS be set aside, if necessary, by way of specific performance of cl 30(4)(a) of the contract. That 'obligation' must be done during the subsistence of the contract, but not after it was rescinded. If and only if the required RS was so set aside, will the plaintiff's 'right to have recourse to the [said] RS' remained untouched as in the aforesaid *Rayack*'s case. D

From the facts of this application, there can never be any dispute that there was no evidence at all that the required RS had ever been set aside or the demand by the plaintiff to request or compel the defendant to set aside such RS before the contract was undisputably rescinded by the plaintiff as discussed above. That being the fact, I therefore held that, the situation fell E squarely within the ambit of s 40 of the Act as being, to borrow the words of the said section, '... [the plaintiff] has signified, by … conduct, [their] acquience in its continuance [ie not to insist the setting up of the required RS during the subsistance of the contract.' As such, the setting of the required RS after rescission took place will therefore be tantamount to 'future [obligations] of the defendant' which the Federal Court held in F *Morello*'s case, as:

> ... [one of] the … obligations of the [defendant] … as [to] the future [obligation which] is discharged … [without affecting] those previously rested or incurred, as the case may be, remained untouched.

In other words, in the circumstances of the facts of this application, the said G *Morello*'s case, is of no assistance to the plaintiff nor is it applicable to the present application before me.

In *Morello*'s case, the main issue before the Federal Court with a split decision involved damages in relation to an unpaid deposit of a sale and purchase of a Jaques crushing plant at the premises of the buyer at Pedas, H Negeri Sembilan, at the price of RM1,167,000. By way of a written agreement, the buyer had agreed to pay to the seller an initial sum of RM116,700 being 10% of the purchase price, expressly stipulated as a deposit, to be paid upon signing the said agreement. The said agreement was actually signed.

In the statement of claim, there was prayer for damages for repudiation, I and not, I must stress here 'not', for a declaration nor for an order of mandatory injunction as in the present case before me. In the material

position of paras (2) and (3) of the statement of defence specifically stated that,

> 2 … it was specifically agreed by both parties that no payments would be made on signing the agreement … [subject to conditions (a)–(d)]
>
> 3 It was further agreed by both parties that the [four subsequent payments of the balance agreed purchase price of the aforesaid plant] would only be made after … [conditions 2(a) to 2(d) referred above] have been obtained, and the plaintiffs were fully aware of and agreed to these.

The Federal Court was asked to determined on the effect of the said cl 3 of the said agreement.

The majority decision of Jemuri Serjan CJ (Sabah and Sarawak) and Edgar Joseph FCJ held at p 578 as:

> (5) … The effect in law of the contractual obligation to pay a deposit is to vest an indubitable right in the vendor to receive the deposit upon the contract coming into existance notwithstanding the subsequent termination. This is because the deposit is given as security for the performance of the contract. …
>
> (6) … .
>
> (7) … The right to recover an unpaid deposit or to forfeit a deposit which has been paid, allows the vendor to obtain compensation without proving his damage and there is no duty to mitigate.

From the above, it can be clearly seen that the above majority decision was premised on the fact that the said 10% payment was a deposit. It was '... given as security for the performance of the contract.' The plaintiff's right is in the nature of 'compensation' after the contract was recognizably repudiated. That conclusion was not agreed upon by Mohamed Azmi FCJ. In dissenting with the above majority decision, his Lordship held that:

> (10) … A claim for paid or unpaid deposit is based on whether the amount claimed was unconditionally due and payable prior to the defendant's repudiation, and whether the consideration for the promise had been executed. The deposit must be in the nature of a true deposit and there must be an unconditional promise to pay the deposit immediately … . Thus, where the promise to pay immediately on signing of the contract is conditional, as in this case …
>
> (11) … To qualify as true deposit, the contract should contain words or expressions capable of being construed to mean that the parties intended the deposit to be for a dual purpose not only as a guarantee of performance [as held by the aforesaid majority decision], but also as part payment towards the purchase price … [which] cannot depend on the mere labelling of the word but must depend on the contruction of the words and expression used in a particular contract. (Emphasis added.)

In support, his Lordship quoted and relied on two Federal Court cases of: (i) *Jagathesan v Linggi Plantations Ltd* [1969] 2 MLJ 253 at p 256; and (ii) *Karuppiah v Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 173. Since the dissenting judgment was well grounded on two Federal Court cases and on

the facts of *Morello*'s case, I am inclined to accept Mohamed Azmi FCJ's view.

Be that as it may, *Morello*'s case has nothing to do with trust money 'in the nature of RS'. There was no claim of LAD involving third parties in *Morello*'s case. Furthermore, no monies have ever been set aside for the RS. As pointed out earlier, the plaintiff did not request or compel the defendant to set aside for RS during the subsistence of the contract. Thus, the plaintiffs application for a mandatory injunction consequential to an issuance of a declaration in their favour, would, applying a paralled reasoning of the dissenting judgment of Mohamed Azmi FCJ above, can be equated to a 'conditional obligation' on the part of the defendant to set up 'a trust fund 'in the nature of RS'. That, I would hold would not be within the ambit of the '[Plaintiff's] right … previously vested … [which] remain untouched', even after the plaintiff rescinded the contract. What is truely the 'plaintiff's right … previously vested' and '... remains untouched', is to claim for appropriate and justifiable damages in the form of compensation, if it can be proved that it was the defendant that constructively caused the plaintiff to rescind the contract. This is also in line and provided for by s 76 of the Act.

Section 76 of the Act provides:

> 76 Party rightfully rescinding contract entitled to Compensation.
> A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non- fulfilment of the contract.

but not the right to a declaration. Thus, it would be obvious from the facts of this application that an order for a declaration and consequentially a mandatory injunction would not be proper remedies to be lavelled against the defendant. The reason for it is statutorily provided in s 65 of the Act which speaks of the 'consequences of recission of voidable contract' to which contractual disputes between the parties aptly can be classified. The said section clearly provides as follows:

> Consequences of rescission of voidable contract
> When a person at whose option a contract is voidable rescinds it. the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received. (Emphasis added).

Since both the learned counsels agreed with the court at the beginning of the submission, the issue of 'whether or not the defendant is required, in law, to set aside the RS after the plaintiff admitted rescinding the contract 'should be addressed first', it is thus incumberant upon me to examine further the statutory effect of the said s 65 of the Act. They also agreed that it would only be necessary for me to consider other issues raised if, and only if, the answer to the said question is in the affirmative but not otherwise; and for that, I will next endeavour to do.

The aforesaid s 65 of the Act can broken down into three parts. They are:

(1) as to the nature of contract itself;

(2) rights and obligations of the party rescinding the contract; and

(3) rights and obligations of the other party to the contract affected by such rescission.

As to (1), there is no doubt that, on the facts, the contract was a valid contract until it was rescinded by the plaintiff as discussed above. The result of that rescission made the contract voidable and not void ab initio for the reasons discussed earlier.

As to (2), the plaintiff's 'rights and obligations' can be classified into those accrued and incurred:

(i) before; and

(ii) after

the contract was rescinded by the plaintiff. Insofar as this application is concerned, I have no doubt whatsoever that the plaintiff had their contractual right to insist that the defendant set aside for the RS before the contract was rescinded, notwithstanding the fact that the defendant may have a justifiable right to set off for LAD as earlier discussed. They can do that by requesting the defendant to do so on their own by remaining them of their contractual duty to do so under cl 30(4)(a) of the contract. Should the defendant fail to do so or ignore such a request, then it would be opened to the plaintiff to invoke s 41 of the Specific Relief Act 1950 ('the SRA').

The aforesaid s 41 of the SRA provides, inter alia:

> 41 Discretion of Court as to declaration of status or right.
> Any person entitled to any legal … right to any property, may institute a suit against person denying, or interested to deny, his right, and the court may in its discretion m therein a declaration that he is so entitled, the plaintiff need not in that suit ask for any other relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration …, omits to do so. (Emphasis added.)

Thus, it would be clear to me that, if the plaintiff had religiously adhered to his contractual obligation(s) and requested that the defendant set aside for the required contractual RS during the life of the contract, but was refused or ignored by the defendant, it would be obvious, in the circumstances, that the former will be entitled to seek for the aforesaid s 41 relief in spite of a wide discretion given to the court whether or not to grant such a declaration. That was not done by the plaintiff. What they did was after and not before the contract was rescinded by them. As such, the said s 41 of the SRA could not be of any assistance to them. As discussed earlier, such 'a right' is not 'a right' accrued and 'remains untouched' after the plaintiff rescinded the contract. In conclusion, the failure on the part of the plaintiff to discharge their contractual 'obligation' in not 'requesting and or compelling' the defendant to set aside for the required RS during the life of the contract, statutorily deprived them of seeking relief under the aforesaid s 41 of the SRA.

In *Caxton (Kelang) Sdn Bhd v Susan Joan Labroov & Anor* [1988] 2 MLJ 604, Siti Norma Yaakob J (as she then was), in quoting *Declaratory Orders* (2nd Ed) by Yoning, pointed out at pp 605–606 that, in order for a declaratory order to be issued, six factors must be present and they are:

(1) There must exist a controversy between the parties.

(2) The proceedings must involve a 'right'.

(3) The proceedings must be brought by a person has a proper or tangible interest in obtaining the order, … [otherwise] referred to as 'standing' or 'locus standi'.

(4) The controversy must be subject to the court's jurisdiction.

(5) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims.

(6) The issue must be ripe, ie it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility. (Emphasis added.)

From the facts of this application, factor (2) above is not present once the plaintiff rescinded the contract in the manner discussed above. Be that as it may, in *Caxton*'s case, the relevant tenancy agreement was still valid, as opposed to the rescinded contract as in the present application.

Another case quoted and heavily relied upon by Mr Vincent was the case of *Mac Jordan Construction Ltd v Brookmount Erostin Ltd (in administrative receivership)* 56 BLR 1, to persuade me to allow his client's application. The basis of his main contention was that, the Court of Appeal in *Mac Jordan*'s case did endorse with approval the principles laid down by Vinelott J in the case of the aforesaid *Rayack*'s case, whereby a declaration and consequential orders were granted by Mr Justice Vinelott. In that context, I have already elaborately pointed out earlier that those principles in the aforesaid *Rayack*'s case, on the facts of this application, cannot be parallelly equated and applicable to either the said *Mac Jordan*'s case or the plaintiff's application.

The *Mac Jordan*'s case, upon close perusal, clearly shows that, both in the court below and in the Court of Appeal, the main issue discussed and considered at length was the issue of 'preferential rights' of the plaintiff over the agreed RS as 'trust fund' over the defendant, but that was not the issue for determination in *Rayack*'s case. In the former case, in dismissing the appeal it was held at p 2 as follows:

> when the bank took its floating charge, it was not then interfering with the contractual rights of the plaintiff and was therefore entitled, when the charge crystallized, to the benefit of its security even though it may have had notice of the plaintiff's contractual right to have the retention fund set aside.
> Per Scott LJ: the court should not, in any event, make the mandatory order sought in circumstances where the effect would be to give an unsecured creditor preference over other unsecured creditor of an insolvent debtor.

Clearly, the above involved an 'insolvent debtor' which is not the case in the present application before me. Thus again the said *Mac Jordan*'s case is therefore of no assistance to the plaintiff's application.

From the above analysis, since the rescission and or termination clause is entrenched in the Contract, the plaintiff may have a justifiable claim for compensation under s 76 of the Act, which is not an issue for me to consider presently. Since it is also not disputed by the parties that the RS had never been set aside, thus in this application, the question of 'trust' and the possible 'breach of trust' is also not an issue before me; hence the case of *Re Marshall's Will Trusts* [1945] 1 All ER 550 could not provide any positive imput for and in favour of the plaintiff as there was no trust ever created by the defendant in the nature of the required RS.

Since it is not the defendant who brought this application, it will be purely academic for me to discuss in more detail than what I have already done so earlier above as to the 'rights and obligations' of the defendant under s 65 of the Act; the third part of the said section. Suffice for me to say that for the purposes of this application they were well justified to oppose the plaintiff's application.

In conclusion, from all the above discussions, upon rescission of the Contract by the plaintiff, the contractual right of the plaintiff to insist the defendant to set aside the required RS is not the plaintiff's 'right … previously vested [that] remained untouched' ('plaintiff's right') contemplated by the aforesaid *Morello*'s case. That plaintiff's right can only be insisted upon during the life span of the contract and not after it was rescinded by the plaintiff as in this application. As such, by virtue of s 56 of the Act, the defendant cannot be mandatorily ordered to fulfil his 'obligation' of setting aside the required RS after 11 July 1998 ; the material date in which the contract was rescinded by the plaintiff. What would be most probably justifiable for the plaintiff, if it can be so proved, is to claim compensation for damages for the defendant's non-fulfilment of his obligation under the contract by virtue of s 76 of the Act. For the reasons elaboratedly discussed above, an order of declaration and its consequential remedies would, in the circumstances of the facts of this application, also be unsustainable. Thus, I have no alternative but to dismiss the plaintiff's application with costs; and so ordered.

Application dismissed with costs.

Reported by Wong Siok Chin